Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DANIEL R. THOMAS
SYLVIA TORRES-THOMAS
Petitioners

versus

UNITED STATES
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINETH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Does the appellate Court's endorsement of the lower court's refusal to address petitioner's complaint pursuant to 28 U.S.C §§ 1330(a) and 1605(a)(1),(2),(4),(5) in conjunction with Article III Section 2 clause 1, 2, Article IV Section 3 clause 1, 2, entitle petitioner to be placed under the protection of this Court's power of supervision?

2. Does the appellate Court's endorsement of the lowers court's determination make a political determination for petitioners, ignoring petitioners argument and making a political decision to bring petitioners under the unincorporated "a territorial" jurisdiction?

3. Does petitioners have a "case arising" issue under Article III that has been ignored because of courts' discretion to rely heavily on decisions construing 28 U.S.C. §1331.

4. Does the appellate Court's agreement with the lower court violate Amendment 10 under the constitutional doctrine that this is a government of enumerated powers?

5. Does petitioners have the legal right by will, to place their res within the domicile of the constitutionally incorporated United States of America and the incorporated State, and then claim—non frivolously—28 U.S.C. §§1330(a) and 1605 (a)(1)(2)(4)(5) as protection from "territorial or other property" jurisdiction of Article IV Section 3 clause 2 as it applies to the territorial public policy of the several states of United States?

6. Is the appellate Court's endorsement of the lower court's action only a recognition of prima facie evidence with prejudice, denying petitioners the constitutional right of 5th Amendment due process of discovery and trial to disprove said prima facie evidence?

7. Does the appellate Court's action move the sovereignty of the United States beyond what is enumerated in the property

clause thus, creating a new grant of power outside and extra territorial to the mandate under the property clause, constitutionally creating a "case arising," under Article III to the Constitution and laws of the United States?

List Of The Parties

Daniel R. Thomas
Sylvia Torres-Thomas
Petitioners

United States
Respondent

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U.S. COURT OF APPEALS - NINETH CIRCUIT
ORDER, Denying Thomases Appeal A1
U.S. District Court A5

Article III Section 2 clause 1, The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party; to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article III Section 2 clause 2, In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Article IV Section 3 clause 1, New states may be admitted by the Congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as the Congress.

Article IV Section 3 clause 2, The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;

Amendment 5 No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 10, The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. SECTION 1330(a) Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any non jury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. SECTION 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. SECTION 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an

agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) is an organ of a foreign state or political subdivision thereof, or a majority of whose share or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" included all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon a act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

28 U.S.C. § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner an to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages;

28 U.S.C. § 1251 (b), (2)

"(b) The Supreme Court shall have original but not exclusive jurisdiction of:

"All controversies between the United States and a State:

48 UNITED STATUTE AT LARGE 112-113:

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be

against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable on money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agriculture purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agriculture indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes." approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and sues, except that gold

coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion of their actual weight."

Approved, June 5, 1933, 4.40 p.m.

NO.

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PETITION FOR WRIT OF CERTIORARI
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BRIEF FOR PETITIONERS

PETITIONERS, Daniel R. Thomas and Sylvia Torres-Thomas respectfully prays that a Writ of Certiorari issue to review the Judgment Memorandum of the U.S. Court of Appeals for the Nineth Circuit, to overturn the lower court's issuing of Judgment converting petitioners complaint under the

Foreign Sovereign Immunities Act into a certificate of probable cause.

OPINIONS BELOW

The U.S. Court of Appeals ORDER filed, July 26, 1994 appears in Appendix A1.

The ORDER of the U.S. District Court appears at A5.

The Court of Appeals' memorandum in this matter agreed with district court that petitioners' action under the Foreign Sovereign Immunities Act has no merit.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Sections 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

The constitutional and statutory provisions is reprinted in its entirety at pet. app. x-xvi . at issue are initially, 28 U.S.C. 1330(a), 28 U.S. C.. 1603, 1604, and 1605(a)(1)(2)(4)(5), 1606; Article III Section 2 clauses 1, & 2, Article IV, Section 3 clause 1 and clause 2, Amendment 10 Amendment Amendment V to the Constitution of the United States, 48 U.S. Statute 112-113,

STATEMENT

Petitioners Daniel R. Thomas and Sylvia Torres-Thomas filed their complaint, in the United States District Court for the District of Oregon pursuant to statutes cited above charging respondent United States and its agents with exceeding their jurisdictional authority. Petitioners maintain that their action is based upon a territorial dispute between the boundaries of the

sovereignty of the unincorporated "a territory of the United States and the sovereignty of the incorporated State of Oregon in "the territory" of the United States.

The district court stated that plaintiffs' claim for declaratory relief is barred by the Declaratory Judgment Act which, with the exception of cases arising under 26 U.S.C. § 7428*, excludes a declaratory judgment remedy from cases involving federal taxes. 28 U.S.C. 2201.

Second, plaintiffs' motion for injunctive relief is barred by the Anti-Injunction Act, 26 U.S.C. § 7421. The Act is strictly enforced and prohibits a taxpayer from bringing a suit for the purpose of restraining the assessment or collection of any tax. Said action was denied by Order of December 6, 1993. (A5)

PETITIONERS' APPEAL TO NINETH CIRCUIT

Petitioners appealed to the United States Court of Appeals for the Nineth Circuit, Appeal No. 94-35010. The Court affirmed the lower Court's decision. The appeal was dismissed and filed on July 26, 1994. **(A1)**

SUMMARY OF ARGUMENT

The framers of our Constitution made it very clear that our government is a government of enumerated powers and that those powers are clearly defined by that instrument. Congress has also made it clear that the immunity of the government, both state and federal, is unquestionable, *except* in certain areas as defined in 28 U.S.C. 1605(a) (1),(2),(4),(5). 28 U.S.C. 1606.

The Appeals Court's decision conflicts with what the Court stated in Verlinden v Central Bank of Nigeria 461 US 480, 76 L Ed 2d 81, 103 S Ct 1962. [1c] "Congress, pursuant to its unquestioned Art I powers, has enacted a broad statutory framework governing assertions of foreign sovereign immunity. **The resulting jurisdictional grant is within the**

bounds of Art III, since every action against a foreign sovereign necessarily involves application of a body of substantive federal law, and accordingly "arises under" federal law, within the meaning of Art III." [14] "A conclusion that the grant of jurisdiction in the Foreign Sovereign Immunities Act is consistent with the Constitution does not end the case. **An action must not only satisfy Art III but must also be supported by a statutory grant of subject-matter jurisdiction.** As we have made clear, deciding" [461 US 498] "whether statutory subject-matter jurisdiction exists under the Foreign Sovereign Immunities Act **entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies."** [Emphasis added] The lower courts failed to apply the substantive terms of the Act in addition to 28 U.S.C. 1251 (b) (2).

Clearly the lower courts' decisions are in error. In doing so, the lower courts violated not only the right to due process as guaranteed by the 5th Amendment; but also the separation of powers under the Constitution of the United States by entering some form of evidence in behalf of the unincorporated appellee and then adjudicating the issue thereby creating another state and that only Congress and the State Legislatures have the power to create new States.

Article IV Section 3 clause 1 to the Constitution of United States reads:

> "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State, nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."

It is important that this issue be settled by this Court as the issue is novel and troublesome and is involved in other numerous cases pending in the lower courts throughout the United States thereby making desirable early and definite ruling by the Supreme Court. Laing v United States 423 U.S. 161, 167 (1976).

ARGUMENT

CONSTITUTIONAL/ FEDERAL QUESTION ISSUES

Article IV Section 3 clause 2 of the Constitution of the United States created "territory or other property" within the geographical boundaries of each state in this Union. It also made it possible for said "territory or other property" to have its own citizens (persons) and legal jurisdictional forum separate from and foreign to the situs of the incorporated Constitutional forum of the Preamble "We the people" based on original sovereignty not given over in the enumerated powers of the federal government. The founding fathers confirm this view by the inclusion of Amendment 10 saying,

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Article IV Section 3 clause 2 also affected the character of the governments of the several states by delegating to them a type of federal authority—based on social and political policy considerations of implied contracts by operation of law—which is to be exercised over those citizens, residents, or persons subject to and contemplated by the Article IV Section 3 clause 2. Said Article had no affect on the character of the private natural individuals/citizens who had expressly chosen to maintain residency in the incorporated states and not volunteer to

participate in the public policy jurisdiction, or part thereof, delegated by Article IV Section 3 clause 2.

PetitionerS, in their study and research of the Constitution and laws of the United States, discovered that they have been presumed through social policy considerations of the several states by operation of law, to have constructively conveyed a gift(s) in succession to establish intangible property in the form of a trust res in "a territorial" jurisdiction administered pursuant to Article IV Section 3 clause 2 by the United States.

The Court stated, regarding Article IV Section 3, that there are two kinds of territories in the United States, "the Territory" and "a territory." The former merely designates a particular part or parts of the earth's surface—the imperial extensive real estate holdings of the Nation; the latter is a governmental subdivision which happened to be called a "territory," but which quite as well could have been called a "colony" or "province." O'Donoghue v United States, (1933) 289 US 516, at 537 and 538.

Justice Taney speaking for the Court in Dred Scott v Sanford (1857) 16 How 393, 15 L. Ed. 691 stated:

> There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and, duties of the State, and the citizens of the State, and the Federal Government. Dred Scott @ 446.

As used in the Restatement of this Subject, the word "state" denotes a territorial unit in which the general body of law is

separate and distinct from the law of any other territorial unit. Restatement, Conflict of Laws, § 2. The sovereignty of "the territory" or "state" incorporated under the Constitution of the United States which petitioner has chosen, is a distinct and separate unit from the sovereignty of "a territorial" unit under local law by which respondent operates.

Congress and the courts have made it clear that Congress has the power to legislate over the territories but how this power comes about is also very clear as stated by the Court in Dred Scott v Sanford, supra.

> But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of government. The powers of the government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by of which alone it continues to exist and act as a government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a territory of the United states, put off its character, and assume discretionary or despotic powers which the Constitution has denied of it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution. The territory being a part of the United States, the government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved.
>
> The powers over person and property of which we speak are not only granted to Congress, but are in express terms denied, and they are forbidden to exercise

them. And this prohibition is not confined to the States, but the words are general, and extend the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under territorial government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the general government might attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a territorial government to exercise them. It could confer no power on any local government, established by its authority, to violate the provisions of the Constitution. Dred Scott @ 449-451

The Court stated in First National Bank v Yankton County, (1879) 101 US 129, 25 L.Ed. 1046, that, "A territorial government is an agency employed by Congress." In the territories the sovereignty of the United States is supreme and complete and the powers of government exercised by the territories are only such as are authorized under the organic act creating the government of the territory. Snow v United States, 18 Wall 317, 21 US L.Ed. 784. Also see Benner v Porter 9 How. 235, 13 L.Ed. 119 where the court said, "The distinction between the federal and state jurisdictions, under the constitution of the United States, has no foundation in territorial governments; and consequently, no such distinction exists either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to state and federal jurisdiction." The Supreme Court, in Simms v Simms

(1899) 175 US 162, 44 L Ed 115, 20 S Ct 58, noting that in the territories of the United States, Congress has the entire dominion and sovereignty, both national and local, federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state, and that Congress could, at its discretion, entrust that power to the legislative assembly of the territory, held that the power so conferred upon a territorial assembly covered domestic relations, **the settlement of estates**, and all other matters which were traditionally regulated by state law only and not by federal law. [emphasis added] See also, People of State of New York ex rel. Kopel v Bingham, 81 N.E. 773, 189 N.Y. 124, affirmed 29 S.Ct. 190, 191, 211 US 468, 53 L.Ed. 286. where the court stated that a "territory" of the United States is a portion of the country not included within the limits of any state and not yet admitted as a state into the Union, but organized under the laws of Congress. In addition see also, In re Kopel, 148 F. 505, 507, citing De Lima v Bidwell, 21S.Ct. 743, 182 US 1, 45 L.Ed. 1041; In re Lane, 10 S.Ct. 760, 135 US 447, 34 L.Ed. 219; Ex parte Morgan, 20 F. 298, 305.

The presumption of petitioners' civil death to property rights and boundaries thereof has lead to the supposition that petitioners are a privileged "persons," and beneficiaries "subject to" the law of succession, and resident trustee to the equitable law of estates in trust, to an unincorporated "a territory" association of United States. Thus, petitioners have been and are being presumed by said policy considerations to be a "persons" with status in the foreign "territory or other property" of the United States subject to the will and policy considerations of the legislature in its territorial courts of Article IV §3 clause 2 via the property clause.

In Kansas v Colorado (1906) 206 U.S. 46 at 89 **speaking of *Article IV Section 3*** the Court stated, "Primarily...it is a grant of power to the United States of control over its property. That is implied by the words **'territory or other property,'** ...it has been referred to in some decisions as granting political and legislative control over the territories as distinguished from the *states of the Union*. But clearly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits."[emphasis added]

Petitioners, upon discovering the afore mentioned true facts and law surrounding the presumed and implied status of their property rights and boundaries thereof, promptly began to constitutionally move to assert their property rights and boundaries thereof in an absolute manner in order to counter any presumption by the authority of the United States, by and through Article IV Section 3 clause 2

Petitioners' action originated because petitioners believes their construction of the Constitution and laws of the United States demonstrate that petitioners have a free and unencumbered choice, without prejudice under the Constitution of the United States, whether or not they have to volunteer their res, by operation of law, as a fiduciary/beneficiary of the public charitable trust association's policy considerations as it is administered through the United States, under power and authority of Article IV Section 3 clause 2 of the Constitution of United States.

Petitioners believe that respondent's tortious actions toward them resulted from respondent's construction of the Constitution

through Article IV §3 clause 2, giving a conflict of Law,[1] that view petitioners as having gifted their res and corresponding property rights into the jurisdiction of said Article IV Sec 3 of the Constitution thus empowering Congress in conjunction with the state legislature to establish public policy considerations, under which respondent covers the true "nature" of its' "commercial" acts, for its' "territory or other property," thereby affecting anyone who is presumed to be within that status. In view of what the Supreme Court stated in Republic of Argentina v. Weltover, Inc. 112 S.Ct. 2160 (1992) infra at p. 26; 26 U.S.C. can only pertain to the "nature" of the act and not its "purpose". Its "purpose", is to mandate all property belonging to United States to preform to its private commercial law.

Thus, petitioners are challenging respondent's tortious taking of petitioners' property boundary rights, in order to compel petitioners to submit to respondent's "territory or other property" jurisdiction as purely a federal question issue of property rights and boundaries thereof that "arise under" the Constitution because petitioners' residence is not within respondent's jurisdiction under the unincorporated public trust association policy, as a fiduciary/beneficiary of "territory or other property" under Article IV Section 3 clause 2 of the Constitution of United States.

Respondent's claimed authority for its action brings up a "federal question" which the court, in Osborn v President, Directors & Co. of Bank (1824) 22 U.S. 738, 6 L.Ed. 204,

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[1]"No sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority beyond these limits is a mere nulity, and incapable of binding such persons or propety in other tribunals." Story—Conflict of Laws, Section 639

said that all other questions must be decided as incidental to the federal question and **those other questions cannot arrest the proceedings.** The court concluded that when a question to which the judicial power is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the federal courts jurisdiction of that cause, **although other questions of fact or of law may be involved in it.** [Emphasis added] Likewise, the court in Verlinden B.V. v Bank of Nigeria supra, reaffirmed the rule that it is a sufficient foundation for jurisdiction within the meaning of the "arising under" clause of Article III §2 clause 1 when the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States and sustained by the opposite construction.

Petitioners' property and boundary rights thereof are sustained by their construction of the Constitution and laws of the United States while respondent is attempting to defeat it by the opposite construction. However, petitioners' attempts to bring their "arising under" issue before the lower court's has been converted into a 28 U.S.C. 1331 action because the courts would not cognize the constitutional merits of the issue statutorially supported by the fact of the waiver of immunity by respondent that bring an action "between the United States and a State" within 28 U.S.C. §1251. Petitioners believes this to be true because there has never been any case law exactly as petitioners are asserting in their cause of action, and, as this Court has indicated, the far reaches of the property clause has never been resolved. Petitioners are asserting issues in these far reaches of the property clause that the lower courts will not cognize, presumably under forum non conveniens, until this Court resolves the issue.

In the words of the Cohens Court "it is apparent upon the face of these clauses (the Court speaking of Article III Section 2 of the Constitution) that in one class of cases the jurisdiction of the courts of the Union depends 'on the character of the cause **whoever** may be the parties. Cohens v Virginia 19 U.S. (6 Wheat) 264, 378, 393, 5 L Ed 257 (1821) [Emphasis added] and quoted in United States v California 328 F 2d 729 (1964). Cert. denied 379 U.S. 817 (1964).

As stated in Article III—Arising Under Jurisdiction, 76 L Ed 2d 831 in reference to Verlinden v Bank of Nigeria supra, concerning Article III Section 2 Clause 1, and "case arising", "However, it should be noted that the jurisdiction conferred by the constitutional 'arising under' clause is broader than the federal question jurisdiction provided by Congress in 28 U.S.C. §1331, even though the language of the statute is almost identical to that of the constitutional clause. The reason given for this distinction is that there exists policy consideration underlying the purpose of the jurisdictional statute that limit its application and which do not enter into the picture when construing the constitutional authorization for statutory federal question jurisdiction."

Petitioners maintains that under their understanding of the Constitution of the United States that respondent, as agent of the United States' "territory or other property," are constitutionally foreign to petitioners' constitutionally incorporated "state" and residency thereof and this dispute brings up a federal question as "arising under" Article III § 2 in conjunction with the statutory grant of 28 U.S.C. 1330(a) 1605(a) (1) (2) (4) (5). And further; this Court stated in Verlinden B.V. v Central Bank of Nigeria, supra at 490 as it relates to 28 USC § 1330(a) that, "The act contains no indication of any limitation based on the citizenship of the petitioner" and

further; at 490 this Court in referring to HR 94—1487 stated: "[T]he Report refers to the growing number of disputes between 'American citizens' and foreign states id., at 6-7 and expresses the desire to insure "*our citizens* ... access to the courts. id., at 6 (emphasis added)." Continuning, "the testimony of Bruno A. Ristau on HR 11315, at 31. Congress . . . not by restricting the class of potential petitioners, but rather by enacting substantive provisions requiring some form of substantial contact with the United States. See 28 USC § 1605. If an action satisfies the substantive standards of the Act, it may be brought in federal court regardless of the citizenship of the petitioner."

In reference to the territories, Congress occupies a dual position—one as the Congress of the United States limited by the constitution, and the other as a local legislature to which many of the constitutional limitations on Congress do not apply. Binns v United States, 194 U.S. 486, 24 S. Ct. 816, 48 U.S. (L. ed.) 1087; Rassmussen v United States, 197 U.S. 516, 25 S. Ct. 514, 49 U.S. (L. ed.) 862.

Likewise, the courts of a territory are legislative courts created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the territories belonging to the United States. Clinton v Englebrecht, 13 Wall. 434, 20 US L. Ed 659. Petitioner has experienced the foreign jurisdiction of "all needful [policy] rules and regulations" in attempting to litigate, to no avail, this dispute in the inferior courts.

Although the power of Congress to acquire territories subsequent to the ratification of the Constitution has never been denied, its source was earlier questioned. The Court stated in Ocean Insurance Companies v Canter 1 Pet., 511,

> ...in the mean time Florida continues to be a Territory of the United States, governed by that clause of the Constitution which empowers Congress to make all

needful rules and regulations respecting the **territory or other property** of the United States. Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result, necessarily, from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source from which power is derived, the possession of it is unquestionable. Dred Scott @ 442-443 [emphasis added]

However, the source of the power was distinguished by Justice Taney whereby Taney stated:

The counsel for the petitioner laid much stress upon that article in the Constitution which confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the "United States;" but, in the judgment of the court, that provision had no bearing on the controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterward acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more. Dred Scott @432

In the Church of Jesus Christ of L.D.S. v United States, (1889) 136 U.S. 1, 34 L. ed. 49, 10 Sup. Ct. Rep. 792, Justice Bradley, announcing the opinion of the court, declared:

The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments.

Both of these views were sustained by the court in Downes v Bidwell, 182 US 244. In addition, it was decided:

> It may not be doubted that by the general principles of the law of nations every government which is sovereign within its sphere of action possesses as an inherent attribute the power to acquire by discovery, by agreement or treaty, and by conquest... These general principles of the law of nations are thus stated by Halleck in his treaties on International law page 126:
>
> A state may acquire property or domain in various ways; its title may be acquired originally by mere occupancy, and confirmed by the presumption arising from the lapse of time; or by discovery and lawful possession; or by conquest, confirmed by treaty or tacit consent; or by grant, cession, purchase, or exchange; in fine, by any of the recognized modes by which private property is acquired by individuals.

In speaking of the relation of a territory to the United States, the Downes v Bidwell supra, court stated:

> The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.

As can be seen, the property clause of the Constitution has been upheld by the courts to apply only to the Territory held by the United States at the time of the Constitution. All subsequent property acquired by the United States must be done so by treaty cession or tacit consent. Petitioners has not gifted their property rights, titles and boundaries thereto into respondents property clause jurisdiction by "treaty," "cession," "exchange," "tacit consent" or other implied power of appointment.

The power over property subject to "a territory" jurisdiction is without limits. Congress may legislate at its will regarding

these objects, and are not restricted to those powers enumerated in the Constitution. They follow the law of nations with regards to acquisition and disposal of property, and are legislating for "foreign countries" in this capacity.

What is a territory? Blacks Law Dict. 5th Ed. says:

> TERRITORY - i) A part of a country separated from the rest and subject to a particular jurisdiction. Geographical area under the jurisdiction of another country or sovereign power. ii) A portion of the United States, not within the limits of any state, which has not yet been admitted as a state of the Union, but is organized, with a separate legislature, and with executive and judicial officers appointed by the president. See Trust Territory. III) An assigned geographical area of responsibility.

What is a Trust Territory? Blacks Law Dict. 5th Ed. says:

> Trust Territory - A territory or colony placed under the administration of a country by the United Nations.

RES AS GIFT IN TRUST

Respondent's action against petitioners refers only to the purpose for which respondent functions as a territory and not the true "nature" of their "commercial activity." The primary "nature" is the commercial *trust res* that creates the Article IV §3 clause 2 "person's" or "beneficiary's" estate in trust.

Petitioners' implied gift of their estate (res) was never intended to be within the United States, but was placed there by United States "or other property" acting through respondent, in the "nature" of their activity by operation of law. Respondent conspired to make a determination that petitioners are decedents and beneficiaries of United States under Article IV Section 3 clause 2 of the Constitution of United States and that petitioners have "other property" with said Article IV jurisdiction. Respondents' actions are being held as unconstitutional, extra-territorial taking in a commercial "nature."

Justice Taney, in expressing the opinion of the court, in Dred Scott v Sanford supra, examined the factual background, the proceedings of the Constitutional convention, the Constitutional intent, provisions in the Constitution to acquire territories, and how acquired territories must be governed. Pertinent portions of that case are as follows which leads to a trust res under the Property Clause.

> ...It does not speak of any territory, nor of Territories, but uses language which, according to its legitimate meaning, points to a particular thing. The power is given in relation only to the territory of the United States - that is, to a territory then in existence, and then known or claimed as the territory of the United States ... Dred Scott @ 436

> And the same power of making needful rules respecting the territory is, in precisely the same language, applied to the other property belonging to the United States - associating the power over the territory in this respect with the power over movable or personal property . . . which then belonged in common to the State sovereignties. Dred Scott @ 437

> For the words, other property necessarily, by every known rule of interpretation, must mean property of a different description from territory or land. And the difficulty would perhaps be insurmountable endeavoring to account for the last member of the sentence, which provides that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State," or to; say how any particular State could have claims in or to a territory ceded by a foreign Government, of to account for associating this procession with the preceding provisions of the clause, with which it would appear to have no connection... Dred Scott @ 439-440

> The words "rules and regulations" are usually employed in the Constitution in speaking of some particular specified power which it means to confer on the Government, and not as we have seen, when granting

general powers of legislation. As, for example, in the particular power to Congress "to make rules for the government and regulation of the land and naval forces, or the particular and specific power to regulate commerce;" "to establish an uniform *rule* of naturalization;" "to coin money and regulate the value thereof." And to construe the words of which we are speaking as a general and unlimited grant of sovereignty over territories which the Government might afterwards acquire, is to use them in a sense and for a purpose for which they were not used in any other part of the instrument. But if confined to a particular Territory, in which a Government and laws had already been established, but which would require some alterations to adapt it to the new Government, the words are peculiarly applicable and appropriate for that purpose. Dred Scott @ 440

In other words, the sovereign people of the States, by their tacit consent of silence, as evidenced by 48 Stat. 113 pledged their property, with rights, titles and boundaries thereto, in common to an unincorporated "a territory" association under the "property clause", to become debtors creditors to indemnify each other in a contractual commercial joint venture for profit that operates outside the citizen's Constitutional protection. This is confirmed by what the Court stated in Fort Leavenworth R.R. v Lowe 114 U.S. 528 that although the Federal Government had not requested a cession of jurisdiction, nevertheless "as it conferred a benefit, the acceptance of the act is to be presumed in the absence of any dissent on their part". Should the individual discover the true facts concerning the implied status of his/their property rights while impliedly a member in that association, the government is powerless over the individual except for what the Constitution has granted to it.

In Williams v United States, (1933) 289 US 553, 77 L Ed 1372, 53 S Ct 751, the court observed that the authority granted to territorial courts to hear and decide controversies arising in the

territories of the United States ... is not that judicial power granted by § 1 and defined by § 2 of Article III of the Constitution; rather it is derived from the property clause, under which Congress may create territorial courts not contemplated or authorized by Article III, and may confer upon them plenary judicial power. The court found that ... such courts ... constitutes appropriate means by which to exercise the congressional power to make needful rules respecting the territory belonging to the United States. See McAllister v United States (1891) 141 US 174, 35 L Ed 693, 11 S Ct 949.

This Court is Constitutionally bound, under Article III, Section 2 clauses 1 and 2 to resolve this "case arising" under the Constitution and Article IV Section 3 clause 2 to determine if an intangible trust res is "other property" within the United States and if so, does petitioners have said res within the United States? The Court held in Kleppe v New Mexico (1976) 426 US 529, 49 L Ed 2d 34, 96 S.Ct. 2285, "...the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved."

SOVEREIGN IMMUNITIES

Petitioners plead 28 USC §§ 1330(a), 1605(a)(1)(2)(4)(5), because petitioners' construction of the Constitution show them that their *res* is **not** within that public policy of that "Territory or other Property" jurisdiction of Article IV Section 3 clause 2 of the Constitution. Petitioners maintains that they have a residency in the Constitutionally incorporated State of Oregon and United States not subject to political rights or franchises as public policy considerations held as privileges in the legislative discretion by Congress, (See Boyd v Nebraska (1892) 143 US 135, 36 L Ed 103, 12 S Ct 375.), thus respondents are foreign as per the "territorial" relation. Said Statute makes it plain, according to petitioners' construction of the statutes and the Constitution to

the United States, that respondent has waved all immunity to suit because:

1) Respondent exist and function as a foreign state against petitioners' right over their res **not** to be a beneficiary of and subject to the political rights or franchises, held as public trust privileges, and entitlements in the legislative discretion by Congress through powers vested under Article IV §3 clause 2 known as "Territory or other Property."

2) Respondent's said foreign status, in relation to petitioners, is a result of Article IV Section 3 clause 2 of the Constitution of the United States of America in order to assert regulatory control over petitioners' property and commerce. See Snow v United States, supra; Kansas v Colorado, supra. However, the "purpose" of said regulatory control over petitioners' property rights is disguised in the "nature" of a an alleged tax while actually only being a "purpose." The "nature" is property rights taken for quasi in rem public commercial trust policy.

3) The United States through its commercial actions, is subject to the jurisdiction of this Court for having waived its immunity by implication. Respondent is functioning only by a prima face presumption of public policy considerations—to assert regulatory control over petitioners' property rights—of the several states that a gift in succession came into being by operation of law.

As the Court stated in The Propeller Genesee Chief v Fitzhugh and quoted in Verlinden B.V. v Bank of Nigeria supra: "The law ... contains no regulations of commerce... It merely confers a new jurisdiction on the district courts; and this is its only object and purpose. ... It is evident ... that Congress in passing [the law], did not intend to exercise their power to

regulate commerce ..." 12 How, at 451-452, 13 L Ed 1058. and further;

"In contrast, in enacting the Foreign Sovereign Immunities Act, Congress expressly exercised its power to regulate foreign commerce, along with other Art I powers. As the House Report clearly indicates, the primary purpose of the Act was to "se[t] forth comprehensive rules governing sovereign immunity."

As stated in Moore's Federal Practice regarding 28 U.S.C. 1604 at JC-800.3 it is read, "the burden remains with the foreign state to present evidence to the court justifying its claim. The ultimate burden of proving immunity rests with the foreign state." And further as regards 28 U.S.C. 1605(a) (1) at JC-800.7 of Moore's Federal Practice it states, "The ideas behind this provision is that a foreign state who has induced a private party to enter into a contract should not thereafter be permitted to unilaterally withdraw the waiver of immunity after the dispute arises." 48 Stat. supra created a commercial private party unilateral contract but as the Court stated in Fort Leavenworth R.R. v Lowe supra, that although the Federal Government had not requested a cession of jurisdiction, nevertheless "as it conferred a benefit, the acceptance of the act is to be presumed in the absence of any dissent on their part".

In essence, respondent, has collected incomplete gifts and is still attempting to collect incomplete gifts under a presumed "contract" or power of appointment from petitioners for their private commercial trust. Now that petitioners have become informed regarding their property rights and boundaries thereof under the Constitution, petitioners have taken action against respondent's in their foreign "a territorial" authority.

4) A clarification of the meaning of "commercial" in 28 U.S.C. §1603(d) for the purposes of determining immunity was

given by the Court in Republic of Argentina v. Weltover, Inc. 112 S.Ct. 2160 (1992). Here the court said,

> [B]ecause the Act provides that the commercial character of an act is to be determined by reference to the 'nature' rather than its 'purpose,' the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a **private party** engages in "trade and traffic or commerce." [emphasis added]

Thus, the "nature" of respondent's tortious actions toward petitioners' property rights and boundaries thereof to administer and enforce an alleged unincorporated "a territorial" commercial trust association are the same as those of a "private party" capable of same. The respondent, in administering the commercial trust of the property clause, act as a "private party" as pointed out in United States v Midwest Oil Co. (1915) 236 US 459, 59 L Ed 673, 35 S Ct 309, where the Court, construing the property clause, pointed out that Congress not only has a legislative power over the public domain, but also exercises the powers of a proprietor therein and **can deal with such lands precisely as an ordinary individual might deal with farming property.** [Emphasis added]

As regards 28 U.S.C. 1605(a) (2), respondent is subject to the jurisdiction of this Court based upon a "commercial activity." According to House Report No. 94—1487, 94th Cong., 2d Sess. (1976). If an activity is one that normally could be engaged in by a private party, it is a "commercial activity" and a foreign sovereign is not absolutely immune from liability therefor; however, if an activity is one in which only a sovereign can engage, it is a non commercial activity for purposes of the Foreign Sovereign Immunities Act. Under this

doctrine, the immunity of a foreign state is "restricted" to claims involving a foreign state's public acts and does not extend to suits based on its commercial or private conduct. Being an alleged member of an unincorporated association viz., private trust via quasi contract against ones will, cannot make this petitioner subject to a foreign state's private acts. Thus, respondent has no immunity from suit.

Additionally Moores Federal Practice, regarding 28 U.S.C. 1605(a)(2), "excepts a foreign state from immunity when; "a representation in the United States by an agent of a foreign state that leads to an action for restitution based upon unjust enrichment." In other words, respondents are trying to enrich themselves at petitioners' expense because petitioners' reading of the Constitution and laws of United States do not make them liable to respondents' foreign territorial jurisdiction of their private trust's public charitable policy.

5) Respondent is subject to the jurisdiction of this Court based upon 28 U.S.C. 1605(a) (4). "There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift. The reason is that, in claiming rights obtained by gift, the foreign state claims the same right which is enjoyed by private persons." See House Judiciary Committee Report No. 94-1487 on Sovereign Immunities Act supra. Petitioners asserts that respondent's actions are based upon public policy considerations of the several states because a gift(s) in succession of petitioners' res, with property rights and boundaries thereof, is presumed to exist by operation of law as evidenced by 48 Stat, supra, and as a result petitioners are presumed to be bound as a privileged fiduciaries/beneficiaries and there is nothing they can do about it. When, in fact, said result of being a privileged beneficiary is nothing more than a

unilateral act, viz., a constructive trust that cannot stand before the will of petitioners not to be privileged "persons." Petitioners maintains that said will as guaranteed by the Constitution of United States and the laws of United States, as interpreted by the Courts, gives petitioners title or right to their property and boundaries thereof which waives any plea of immunity. Petitioners have the legal right to place their res within the residency of the constitutionally incorporated United States of America, outside the special public policy jurisdiction of Article IV § 3 clause 2. Thereby, claiming 28 U.S.C. §§1330(a) and 1605(a)(1)(2)(4)(5) as access to "case arising" under Article III of the Constitution.

Petitioners' argument is further substantiated in California v Arizona 440 US 59 whereby this Court stated in relation to the changing of political boundaries between two states as a result of the flow of a river.

> "These shifts created confusion about the location of the political boundaries between California and Arizona. This problem was resolved through an interstate compact ratified by the Congress in 1966. The compact fixed the boundary by stations of longitude and latitude divorced from the continuing shifts of the Colorado River."

Likewise the continuing confusion over the shifting in public policy as evidenced by 48 Stat. supra, created a political boundary dispute between petitioners and respondent. Said shifting public policy was not ratified by petitioners as petitioners' compact resides with the United States and the State of Oregon within the boundaries as established by the Constitution to the United States, this dispite respondent's claims to the contrary which respondent must substantiate.

Granted, there is nothing in the constitution under Article IV Section 3 clause 1, that prohibits the people from creating a new state but respondent's assertion, by their tortious actions that

petitioner created another state, must be proved. as Justice Taney stated in *Dred Scott v Sanford* supra, the creation of new states must be done by treaty or cession.

REASONS FOR GRANTING THE WRIT

1) A federal question "arising under" Article III § 2 clause 1 has been presented showing that there exists a boundary dispute between petitioners and respondent over who resides in what territory of the United States.

2) That said dispute is between petitioners as sovereign in the state of the distinct and separate territorial unit called "the territory" with its general laws incorporated under the Constitution of United States. Whereas respondent is functioning under the state sovereignty of the distinct and separate territorial unit called "a territory" unincorporated under local law of the United States, making a "controvers[y] between the United States and a State," also falling under Article III §2 and 28 U.S.C. 1251 (b)(2).

3) No adequate relief is available from any other court because there is basically no case law pursuant to petitioners' application.

CONCLUSION

Petitioners submits that this Court should grant certiorari here to reverse the Circuit Court's judgment .

Respectfully submitted,

Daniel R. Thomas

DATE: 10/17/94

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINETH CIRCUIT

DANIEL R. THOMAS; SYLVIA TORRES THOMAS,

No. 94-35010

Plaintiffs-Appellants,

D. C. CV-93-00955-MFM

v.

UNITED STATES OF AMERICA

Defendant-Appellee

Appeal from the United States District Court
for the District of Oregon
Malcolm F. March, District Judge, Presiding
Submitted July 18, 1994**

Before: FARRIS, KOZINSKI, AND NOONAN, Circuit Judges

Taxpayers Daniel Thomas and Sylvia Torres Thomas appeal pro se the districts courts' dismissal for lack of subject matter jurisdiction of their action seeking (1) to enjoin the Internal Revenue Service ("IRS") from enforcing a notice of levy, and (2) compensatory damages in an amount equal to taxes paid for tax years 1987 through 1992. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, Kruso v International

Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, 496 U.S. 937 (1990), and affirm.

First, as the district court found, the Thomases' claim for injunctive relief against the IRS is barred by the Anti Injunction Act ("Act"), 26 U.S.C. § 7421(a). Although there is several statutory exceptions to the Act, the Thomases so not contend that any of the statutory exceptions are applicable here. If a taxpayer fails to show that his suit falls within one of the exceptions, the district court must dismiss the suit for lack of subject matter jurisdiction. Jensen v IRS, 835 F.2d 196, 198 (9th Cir. 1987).

Therefore, any claim for injunctive relief was properly dismissed. See id.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Second, any claim for money damages asserted by the Thomases is barred by the doctrine of sovereign immunity because the United States has not expressly waived its immunity and consented to be sued. See Gilbert v DaGrossa 756 F.2d 1455, 1458 (9th Cir 1985) (absent express statutory consent to be sued, dismissal is required). To the extent that the Thomases seek a tax refund, they have failed to allege exhaustion of their administrative remedies under 26 U.S.C. § 7422 (a). See Thomas v United States, 755 F.2d728, 729 (9th Cir. 1985). Accordingly, the district court dismissed the Thomases' claim for damages. 1/

1/ To the extent the Thomases seek declaratory relief, their action is barred by the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201 (a). See Hughes v United States, 953 F.2d 531, 536-37 (9th Cir. 1992) (district court has jurisdiction over cases seeking declaratory relief, except for disputes with respect to federal taxes). The Thomases' contention that the district court had jurisdiction pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1605 (a) (1) & 4 also lack merit. This statute confers jurisdiction on United States district courts over actions against foreign states. The Thomases' complaint fails to provide any basis for the district asserting jurisdiction under this statute.

The government requests sanctions against the Thomases for filing a frivolous appeal. We have discretion to impose sanctions against litigants, even pro se, for bringing a frivolous appeal. Fed. R. App. P. 38; 28 U.S.C. § 1912; Wilcox v Commissioner, 848 F.2d 1007, 1008-09 (9th Cir. 1988) ($1,500 sanction imposed on pro se litigant for bringing a frivolous appeal). "An appeal is frivolous if the result is obvious, or the arguments or error are wholly without merit." Wilcox, 848 F.2d at 1009. This appeal is frivolous because the result is obvious and the Thomases' argument are wholly without merit. Nevertheless, because this appears to be the Thomases' first action raising these issues, we refuse to impose sanctions.

AFFIRMED.

FILED JULY 26, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON

Daniel R. Thomas
Sylvia Torres-Thomas
Plaintiffs

Civil Action 93-955 MA

vs

United States of America
Defendant

ORDER

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MARSH, Judge.

1- ORDER

Plaintiffs filed this action seeking a declaration that an IRS notice of intent to levy is unlawful and for an injunction against the enforcement of the notice and for compensatory damages equal to taxes paid for the years 1987-1992. Defendant moves for dismissal on the basis of sovereign immunity.

First, plaintiffs' claim for declaratory relief is barred by the Declaratory Judgment Act which, with the exception of cases arising under 26 U.S.C. § 7428*, excludes a declaratory judgment remedy from cases involving federal taxes. 28 U.S.C. 2201.

Second, plaintiffs' motion for injunctive relief is barred by the Anti-Injunction Act, 26 U.S.C. § 7421. The Act is strictly enforced and prohibits a taxpayer from bringing a suit for the purpose of restraining the assessment or collection of any tax. Maxfield v United States Postal Service, 752 F.2d 433, 434 (9th Cir. 1984). Aside from statutory exceptions "NA" here, one judicial exception to the Act exists. See Elias v Connett, 908 F.2d 521, 523 (9th Cir. 1990). The taxpayer must demonstrate that "under no circumstances can the government ultimately prevail on the merits; and (2) the taxpayer will suffer irreparable injury without injunctive relief." Id., at 525.

Here, plaintiffs fail to demonstrate that they would suffer irreparable injury. The notice of tax lien reflects a taxes owing of $500 plus interest which continues to accrue, while plaintiffs' own submission of tax forms for previous filing years demonstrates

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*Section 7428 governs declaratory judgments relating to the status of charitable organizations.

that they clearly have had the financial resources to respond and that they are currently employed as a physician and nurse. In addition, I find that the government's chances of prevailing on the merits is high given the merits of plaintiffs' dispute. Plaintiffs apparently contend that taxes they paid from 1987-1992 were "gifts" which they want back. In support of their contention, plaintiffs' Exhibit B reveals that plaintiffs caused to be published in the Oregonian, a "declaration of independence" declaring their:

> "right to expatriate absolute our res in trust to the foreign jurisdiction known as the municipal corporation of the district of columbia, a democracy, and return to the republic any and all past and present political ties implied by operation of law otherwise in trust with the democracy is hereby resolved."

Based upon the lack of any evidence that plaintiffs will suffer irreparable injury or that the government's position lacks merit, I find that plaintiffs' claim for injunctive relief is barred by the Anti-Injunction Act.

Finally, the United States is a sovereign entity and may not be sued without its consent. Elias, 908 F.2d at 527. Sovereign immunity extends to United States agencies, including the IRS. Whittle v United States, — F.3d —, 1993 WL 426436 (6th Cir. 1993). Further, sovereign immunity extends to claims of constitutional violations. See, Id. (district court lacked subject matter jurisdiction over equal protection claim against IRS).

Plaintiffs bear the burden of establishing subject matter jurisdiction of the court over their claims. Id., at *1.

To the extent that plaintiff challenges the merits of the

notice of assessment, subject matter jurisdiction is lacking and I am unaware of any valid statutory basis for waiver in this case. See Elias, 908 F.2d at 523; and Hughes v United States, 953 F.2d 531 (9th Cir. 1992). Any evaluation of the merits of plaintiffs' claim would necessitate inquiry into their income and taxpaying status. As such, it is a challenge to the underlying tax liability which may not be raised in federal court prior to the taxpayers' payment of the disputed assessment and filing of an administrative claim. See McMillen v United States, 960 F.2d 187, 189 (1st Cir. 1991).

Accordingly, plaintiffs' motion for preliminary injunction (#5-2) is DENIED and defendant's motions to dismiss for lack of subject matter jurisdiction (#6, #15) are GRANTED and this action is DISMISSED.

IT IS SO ORDERED.
Dated this 6th day of December, 1993.

/s/_____
Malcolm F. Marsh
United States District Judge